Tai Choi Yu v Curtin University of Technology Sarawak Campus, Malaysia & Anor

HIGH COURT (MIRI) — SUIT NO 22-37 OF 2002 (MR)
ABDUL AZIZ JC
25 MARCH 2004

Civil Procedure — Amendment — Statement of claim — Proposed amendment to change name of first defendant from 'Curtin University Technology, Sarawak' to 'Curtin University Technology, Sarawak (also known as Curtin Malaysia Sdn Bhd)' — Curtin Malaysia Sdn Bhd shareholder of University — Whether proposed amendment equated University and Curtin Malaysia Sdn Bhd as same body — Whether factually and legally correct — Whether proposed amendment served any purpose in advancing plaintiff's cause

The plaintiff sued the second defendant for defamation. The second defendant was an employee of the first defendant, Curtin University of Technology, Sarawak ('the University'). The first defendant's liability was one of vicarious liability. The University was established by Curtin Malaysia Sdn Bhd ('CMSB') at the invitation of the Minister of Education of Malaysia and pursuant to s 22 of the Private Higher Educational Institutions Act 1996 ('the Act'). The University was then registered under the Act in the name of 'Universiti Teknologi Curtin Sarawak, Malaysia (Kampus Lutong)'.

This was the plaintiff's application to amend his writ of summons and the statement of claim in respect of the first defendant's name. In the plaintiff's proposed amendment, the plaintiff wanted to amend the name of the first defendant from 'Curtin University Technology, Sarawak' to 'Curtin University Technology, Sarawak (also known as Curtin Malaysia Sdn Bhd)'.The plaintiff in his affidavit stated that the amendment was necessary because, as a result of the plaintiff's search with the Companies Commission of Malaysia ('CCM'), it was shown that the first defendant was also known as CMSB. The CCM search result was exhibited as exhibit TCY-1. The first defendant objected to the plaintiff's application on the grounds that there was no nexus established between the first defendant and CMSB. The first defendant also contended that the proposed amendment was inconsistent with the plaintiff's pleading that the first defendant was an educational institution established in Perth, Australia and was managing and operating a branch of the institution in Sarawak.

Held, dismissing the plaintiff's application:

(1) CMSB was one of the shareholders of the University. Thus, the University and CMSB were two separate entities. The plaintiff's proposed amendment equated the University and CMSB as the same and one body, which was factually and legally incorrect. Further, a closer examination of exhibit TCY-1 showed that CMSB and the University were not one and the same entity. What was stated in exhibit TCY-1 in relation to the principal activities of CMSB was 'conducting an educational facility known as a Curtin University of Technology, Sarawak Campus, Malaysia'. Exhibit TCY-1 did not say

that CMSB was also known as 'Curtin University of Technology Sarawak Campus, Malaysia' or that 'Curtin University of Technology Sarawak Campus, Malaysia' was also known as CMSB. An appreciation of the separate identity of the University and CMSB was pertinent and had a strong bearing on the plaintiff's claim against the first and second defendants, since the first defendant's liability was one of vicarious liability. Thus, it was of great importance to the plaintiff to establish clearly in fact and in law as to who the real employer of the second defendant was (see paras 9 and 10).

(2) From the pleadings, the plaintiff had always maintained that the University was the second defendant's employer. There was nothing in the plaintiff's statement of claim to show that the second defendant had any interest in or connection with CMSB or that CMSB was the second defendant's employer. Hence, the proposed amendment would not serve any purpose in advancing the plaintiff's cause. Even if the amendment were to be allowed, no judgment can be entered against 'Curtin University of Technology Sarawak Campus, Malaysia (also known as Curtin Malaysia Sdn Bhd)' because such entity was non-existence and not recognised in law, either under the Companies Act 1965 or the Act (see paras 10 and 11); *Ponnusamy v Nathu Ram* [1959] MLJ 228 followed.

(3) Further, the plaintiff's case was against an educational institution registered under the Act. This institution was not the same entity as CMSB. Hence, to insert the name of CMSB not as an additional or separate defendant but as synonymous with the present first defendant in the title of the writ and the statement of claim would create an anomaly because the statement of claim did not disclose a cause of action against CMSB. Accordingly, the proposed amendment was useless and would add to the confusion of the parties and also embarrass the first and second defendants (see paras 14 and 17).

[**Bahasa Malaysia summary**

Plaintif menyaman defendan kedua kerana memfitnah. Defendan kedua merupakan pekerja defendan pertama iaitu Curtin University of Technology of Sarawak (Universiti tersebut). Liabiliti defendan pertama adalah liabiliti vikarious. Universiti tersebut telah didirikan oleh Curtin Malaysia Sdn Bhd (CMSB) setelah dijemput oleh Menteri Pendidikan di bawah s 22 Institut Pengajian Tinggi Swasta 1966 (akta tersebut) Universiti itu seterusnya di daftarkan di bawah akta ini atas nama Universti Teknologi Curtin Sarawak (Kampus Lutong).

Ini merupakan permohonan plaintif untuk membetulkan writ saman dan penyata tuntutannya mengenai nama defendan. Dalam pembetulan yang dicadangkan oleh plaintif, beliau ingin menukarkan nama defendan pertama dari 'Curtin University Technology, Sarawak' ke 'Curtin University Technology, Sarawak' (juga dikenali sebagai Curtin Malaysia Sdn Bhd) Plaintif menegaskan bahawa pembetulan ini penting kerana hasil pencarian

plaintif di 'Companies Commission of Malaysia' (CCM) menunjukkan bahawa defendan pertama dikenali sebagai CMSB. Hasil pencarian di CCM dieksibitkan sebagai eksibit TCY-1. Defendan pertama membantah permohonan plaintif kerana tiada nexus yang dapat diwujudkan di antara defendan pertama dan CMSB. Defendan pertama juga telah menegaskan bahawa pembetulan yang dicadangkan tersebut tidak konsisten dengan pliding plaintif yang menyatakan bahawa defendan pertama merupakan satu institusi pendidikan yang diwujudkan di Perth, Australia dan sedang beroperasi dan menguruskan cawangannya di Sarawak.

Diputuskan, permohonan pliantiff ditolak:

(1) CMSB adalah pemegang saham Universiti tersebut, jadi unversiti dan CMSB adalah dua entiti yang berlainan. Pembetulan yang dicadangkan oleh Plaintiff menyamakan Universiti dan CMSB sebagai badan yang sama, ini adalah kesalahan dari segi fakta. Jika meneliti eksibit TCY-1, ia menunjukkan bahawa Universiti dan CMSB bukanlah entiti yang sama.apa yang tertera dalam eksibit tersebut. Apa yang tertera dalam eksibit tersebut adalah tentang aktiviti utama yang dijalankan oleh CMSB iaitu 'conducting an educational facility known as a Curtin University of Technology, Sarawak Campus, Malaysia'. Eksibit tersebut tidak menyatakan bahawa CMSB dikenali sebagai Curtin University of Technology Sarawak Campus, Malaysia' ataupun bahawa 'Curtin University of Technology Sarawak Campus, Malaysia' juga dikenali sebagai CMSB. Adalah penting untuk membezakan kedua entiti tersebut kerana ia mempengaruhi tuduhan plaintif terhadap defendan pertama dan kedua, kerana liabiliti deffendan yang pertama adalah liabiliti vikarious. Adalah penting untuk plaintif untuk menjelaskan dengan jelas dalam isu fakta dan undang-undang bahawa siapa yang merupakan majikan defendan kedua (lihat perenggan 9 dan 10).

(2) Dari pliding yang dikemukakan, plaintif menegaskan bahawa Universiti merupakan majikan defendan kedua. Tidak terdapat apa-apa maklumat dalam penyata tuntutan untuk menunjukkan bahawa defendan mempunyai apa-apa faedah ataupun kaitan dengan CMSB atau jika defendan kedu merupakan majikan CMSB. Jadi pembetulan yang dicagdangkan itu tidak mendatangkan sebarang faedah untuk permohonan plaintif. Walaupun pembetulan itu dibenarkan, tidak ada penghakiman yang dapat dimasukkan menentang Curtin University of Technology Sarawak Campus, Malaysia (juga dikenali sebagai Curtin Malaysia Sdn Bhd) kerana entiti ini tidak wujud dan tidak ada ikatan undang-undang sama ada di bawah Akta Syarikat 1956 ataupun akta tersebut (lihat perenggan 10 dan 11). *Ponnusamy v Nathu Ram* [1959] MLJ 228 diikuti.

(3) Kes plaintif ini adalah menentang institusi pendidikan yang didaftar di bawah akta tersebut. Institusi ini tidak sama dengan CMSB . Adalah tidak wajar untuk menggunakan CMSB sebagai defendan kedua atau defendan berlainan. Dengan menggunakan defendan kedua sinonim dengan defendan pertama dalam writ dan penyata tuntutan akan

mewujudkan satu anomali kerana penyata tuntutan tidak menjelaskan kausa tindakan terhadap CMSB. Jadi cadangan pembetulan itu tidak berguna dan akan mengelirukan kesemua pihak yang berkaitan dan memalukan defendan-defendan tersebut (lihat perenggan 14 dan 17).]

Notes

For cases on amendment of statement of claim, see 2(1) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 478-488.

Cases referred to

Daimler Co Ltd v Continental Tyre and Rubber Co (Great Britain) Ltd [1916] 2 AC 307 (refd)
Eshah bte Sa'at v Meriam bte Sa'at & Ors [1975] 2 MLJ 97 (refd)
Lazard Bros & Co v Midland Bank Ltd [1932] All ER 571 (refd)
Ponnusamy v Nathu Ram [1959] MLJ 228 (folld)
Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd [1983] 1 MLJ 213 (refd)

Legislation referred to

Private Higher Educational Institutions Act 1996 s 22
Rules of the High Court 1980 O 20 r 1(1), O 20 r 3(1), O 20 r 5

Tai Choi Yu (Tai Choi Yu & Co) for the plaintiff
David Lim (Wan Ullok Jugah Chin & Co) for the defendant

Abdul Aziz JC:

[1] Summons-in-chambers dated 10 April 2003 (encl 22) is the plaintiff's application to amend his writ of summons (encl 2), in particular the name of the first defendant. The plaintiff also applied for the same amendment to be made to his statement of claim.

[2] The plaintiff gave three grounds for the application. First, the amendment is necessary for the purpose of determining the real question in controversy between the parties. Second, it is to save time, cost and multiplicity of proceedings; and third, the amendment does not prejudice the defendant.

[3] The application is supported by an affidavit affirmed by Tai Choi Yu, the plaintiff himself, on 10 April 2003 ('plaintiff's affidavit'). The relevant paragraphs of the plaintiff's affidavit are paragraphs 4, 5, 6 and 7. In particular, paragraph 6 of the plaintiff's affidavit states that the amendment is necessary because as a result of plaintiff's search with the Companies Commission of Malaysia ('CCM'), it was shown that the Defendant is also known as Curtin Malaysia Sdn Bhd ('CMSB'). The result of the plaintiff's search with CCM is exhibited as Exh TCY-1 in the plaintiff's affidavit.

[4] The first defendant objected to the plaintiff's application and had filed an affidavit in reply (encl 39) affirmed by David Lim Chin Chai on 21 May 2003. The first defendant submitted that there is no nexus established

between the first defendant and CMSB. It was submitted that the first defendant is an educational institution which offers courses of studies at university level under a licence from the Ministry of Education Malaysia. Whereas CMSB is a limited company registered with the CCM. It was also submitted on behalf of the first defendant that the plaintiff's summons-in-chambers did not disclose the plaintiff's interest to join CMSB as a party. It was contended by the first defendant that the proposed amendment is inconsistent with paragraph 2 of the plaintiff's statement of claim. In paragraph 2 of his statement of claim, the plaintiff had pleaded that the first defendant is an educational institution established in Perth, Australia and managing and operating a branch of the institution in Sarawak. Learned counsel for the first defendant also submitted that the effect of the amendment is to create embarrassment and it is futile in nature.

[5] It is trite that parties may make amendments to the writ or pleadings at any stage of the proceedings. Amendments to the writ and pleadings may be made without leave of the court once before the close of the pleadings. This is plain from O 20 r 1(1) and r 3(1) Rules of the High Court 1980 ('the RHC'). But if pleadings are deemed to be closed, then amendments may only be made pursuant to O 20 r 5, that is, with leave of the court. It is then entirely in the discretion of the court whether or not to allow the amendments. However, as regards an amendment to a writ for the purpose of adding, omitting or substituting a party to an action or to alter the capacity of the party to an action O 20 r 1(1) does not apply. Amendments of this nature must be made with leave of the court. In exercising its discretion whether or not to grant the leave to amend, the court exercises it judiciously by taking into consideration several factors.

[6] In *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd* [1983] 1 MLJ 213 at p 214, Mohamed Azmi FCJ, in delivering the judgment of the Federal Court, said:

> The general principle is that the court will allow such amendments as will cause no injustice to the other parties. Three basic questions should be considered to determine whether injustice would or would not result, (1) whether the application is bona fide; (2) whether the prejudice caused to the other side could be compensated by costs and (3) whether the amendments would not in effect turn the suit from one character into a suit of another and inconsistent character.

[7] The above statement of the law has been the general guide applied and adopted by the courts in refusing or granting leave to amend. However each case is to be decided on its own facts and circumstances. Therefore, besides the general principle as stated above, other factors and considerations peculiar to each case must also be taken into account. In this regard I refer to a commentary on the principles applicable on amendments as found in Malaysian Court Practice – High Court (MLJ, 1998) at p 552. The commentary reads as follows:

> In *Ponnusamy v Nathu Ram* [1959] MLJ 228, it was held that in dealing with an application to amend the pleadings, the court should consider the materiality and the effectiveness of the amendment, and it was well established practice not to allow an amendment where it appeared that such amendment would be useless.

The court should look at the probable consequence of the amendment and if the amendment would be ineffectual then it ought not to be allowed to be made. See also *Eshah bte Saat v Meriam bte Saat* [1975] 2 MLJ 97. Further, the amendment must relate to the purposes of litigation and not be made for ulterior motive: *Milano Assicuraziona SPA v Wallbrook Insurance Co Ltd* [1994] 1 WLR 997.

[8] In the writ that the plaintiff has taken against the first and second defendant, the plaintiff is claiming, inter alia, for damages for defamation by the second defendant, who according to the plaintiff is the employee of the first defendant, Curtin University of Technology, Sarawak ('the University'). It is not disputed that the University was established at the invitation of the Minister of Education, and it functions and operates as an autonomous body. The University was established by CMSB at the invitation of the Minister of Education of Malaysia on 4 December 1998. The invitation was issued pursuant to s 22 of the Private Higher Educational Institutions Act 1996 (Act 555). The University was then registered under the same Act under the name of 'Universiti Teknologi Curtin Sarawak, Malaysia (Kampus Lutong)'. These facts are evident by exhibits DCCL-2 and DCCL-1 in the defendant's affidavit in opposition in encl 39. On the other hand, CMSB is a registered company and is one of the shareholders in the University. This makes the University and the CMSB two separate body or entities.

[9] In the plaintiff's proposed amendment, the plaintiff wanted to amend the name of the first defendant from 'Curtin University Technology, Sarawak' to 'Curtin University Technology, Sarawak (also known as Curtin Malaysia Sdn Bhd)'. In my view the proposed amendment equates the University with CMSB as the same and one body – that is, CMSB and vice versa. This is factually and legally not correct for the reasons given earlier. A closer examination of exhibit TCY-1 in the plaintiff's affidavit in support of the application shows that CMSB and the University are not one and the same entity. What is stated in exhibit TCY-1 in relation to the activities of CMSB is 'Principal activities: Conducting an educational facility known as a Curtin University of Technology, Sarawak Campus Malaysia'. It does not say that 'Curtin (Malaysia) Sdn Bhd (also known as Curtin University of Technology Sarawak Campus Malaysia)' or Curtin University of Technology Sarawak Campus Malaysia (also known as Curtin (Malaysia) Sdn Bhd)'.

[10] An appreciation of the separate identity of the University and the CMSB is pertinent and has strong bearing on the plaintiff's claim against the first and the second defendants. As 1 have said earlier, the second defendant is being sued as an employee of the first defendant and the first defendant's liability therefore is one of vicarious liability. Thus, it is of great importance to the plaintiff to establish clearly in fact and in law as to who is the real employer of the second defendant. Is it the University or the CMSB. From the pleadings in this case, particularly the plaintiff's statement of claim, the plaintiff had all along maintained that the University is the employer of the second defendant. There is nothing in the plaintiff's statement of claim to show or even suggest the second defendant has any

A interest in or connection with Curtin (Malaysia) Sdn Bhd; or that the CMSB is the employer of the second defendant.

[11] Applying the principle in *Ponnusamy's* case (supra), I think the proposed amendment does not serve any purpose in advancing the plaintiff's cause. Even if the amendment is to be allowed, no judgment can B be entered against 'Curtin University of Technology Sarawak Campus Malaysia (also known as Curtin (Malaysia) Sdn Bhd)' because such entity is non existent and not recognised in law – either under the Companies Act 1965 or the Private Higher Educational Institutions Act 1996 (Act 555).

[12] In *Lazard Bros & Co v Midland Bank Ltd* [1932] All ER 571, the C House Lords, in dealing with an issue whether an action could be maintained against a non existent defendant, said in the judgment of Lord Wright at p 576:

> I shall deal first with the question (ii) which is most important and is decisive, since it is clear law, scarcely needing any express authority that a judgment must be set aside and declared a nullity by the court in the exercise of its inherent D jurisdiction if and as soon as it appears to the court that the person named as the judgment debtor was at all material times at the date of the writ and subsequently non existence.

[13] The learned judge then cited a passage by Lord Parker in *Daimler Co Ltd v Continental Tyre and Rubber Co (Great Britain) Ltd* [1916] 2 AC 307 E at p 337 and continued to say as follows:

> In such a case the plaintiff cannot be before the court. In the present case if the defendants cannot be before the court because there is in law no such person, I think by parity of reasoning the court must refuse to treat these proceedings as other than a nullity.

F **[14]** In this instant case, the plaintiff's case is against an educational institution registered under the Private Higher Educational Institutions Act 1996. This institution is not the same entity as CMSB which was formed and registered under the Companies Act 1965. To insert the name of 'Curtin (Malaysia) Sdn Bhd' not as a additional or separate defendant, but as synonymous with the present first defendant in the title of the writ and G the statement of claim, would create an anomaly because the statement of claim does not disclose a cause of action against CMSB.

[15] In *Ponnusamy* (supra), the court refused to allow the amendment sought because the amendment would not assist the applicant's case. This is so because by the amendment the applicant was trying to introduce H extraneous evidence to prove the contents of a written instrument namely the memorandum of transfer, and this is not allowed under s 92 of the Evidence Act 1950.

[16] In *Eshah bte Sa'at v Meriam bte Sa'at & Ors* [1975] 2 MLJ 97, Razak J (as he then was), in applying *Ponnusamy*, said at p 97:

I > It has been held that in dealing with the application for amendment, the court has to consider the materiality and effectiveness of the amendment and that it was well established practice not to allow an amendment where it appeared such

amendment would be useless. The court should look at the probable consequence of the amendment and if the amendment would be ineffectual then it ought not to allowed to be made.

[17] On the above authorities, and the principles that can be gleaned from them, and having regard to the pleadings in the statement of claim by the plaintiff and the purpose of the amendment, I am of the view that the proposed amendment is ineffectual in clarifying the issues that need the consideration of the court. On the contrary, the proposed amendment may add to the confusion of the parties and also would embarrass the first and second defendant. Therefore I conclude that the proposed amendment is useless.

[18] Accordingly I dismiss the plaintiff's application in encl 22 with costs.

Plaintiff's application dismissed with costs.

Reported by Lim Lee Na